United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1536

United States Court of Appeals

FOR THE SECOND CIRCUIT

RALPH FUCCI,

Plaintiff-Appellant,

—against—

KONINKLIJKE ROTTERDAMSCHE LLOYD, N.V.,

Defendant-Appellee and Third-Party Plaintiff,

—against—

UNIVERSAL TERMINAL & STEVEDORING CORP.,

Third-Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS
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Issue

Is the charge reversibly erroneous?

Agreed Statement

Plaintiff longshoreman sued defendant shipowner for claimed injuries when plaintiff slipped on seeds on the steel deck in the hold of defendant's vessel, which seeds plaintiff claimed came from broken cargo bags. Plaintiff claimed he slipped and fell about 2 P.M. and that seeds had been on the deck ever since 8:30 A.M. Plaintiff claimed

that other longshoremen had slipped in the morning and afternoon but that none of the others had fallen. Plaintiff testified during the February 1974 trial that he slipped and fell while helping push a heavy draft before it began to rain. In a statement he signed in July 1970, four days after his claimed accident, plaintiff said he slipped and fell on seeds while walking toward the hatch ladder after the longshoremen had been ordered to cease work because of heavy rain.

Argument

The Court did not err in refusing to charge the Safety and Health Regulations for Longshoring (Appendix, *infra* pp. 5-6). Sections 1504.2(a)(b) and 1504.3(c)(d) exclude shipowners, *Albanese* v. *N.V. Nederl. Amerik. Stoomv. Maats.*, 346 F. 2d 481, 484 (2 Cir. 1965), rev'd 382 U.S. 283 (1965), but implicitly aff'g on this point, 382 U.S., p. 284. Also, by definition, § 1504.3(a), and decision, *United States* v. *Grace Line*, 221 F. Supp. 339, 341 (S.D.N.Y. 1963), compliance with the requested Regulations' objective standard is absolute, contrary to the charge that negligence means failure to use *reasonable* care (45a-46a) and unseaworthiness means less than *reasonable* fitness, not accident-proof perfection (48a-50a). This Court is not bound by contrary Fourth Circuit decisions,* *S.E.C.* v. *Shapiro*, 494 F. 2d 1301, 1306, fn. 2 (2 Cir. 1974), and make-weight reference to the Regulations in an opinion affirming a non-jury determination of unseaworthiness, *Reid* v. *Quebec Paper Sales & Transp. Co.*, 340 F. 2d 34, 35 (2 Cir. 1965), does not author-

* Appellant cites *Provenza* v. *American Export Lines*, 324 F. 2d 660, 665-666 (4 Cir. 1963), cert. denied 376 U.S. 952 (1964), and *Venable* v. *A/S Det Forenede*, 399 F. 2d 347, 353 (4 Cir. 1968), Judge Bryan dissenting in both cases.

ize charging the Regulations. Furthermore, even if the Regulations might properly be charged with suitable explanations of their applicability, meaning, and scope, plaintiff's request 9(3a) is defectively incomplete and deniable on that ground. *United States* v. *Lease,* 346 F. 2d 696, 702 (2 Cir. 1965); *Savard* v. *Marine Contracting Inc.,* 471 F. 2d 536, 540 (2 Cir. 1972), cert. denied 412 U.S. 943 (1973).

The accusation that the Court charged assumption of risk is false. The quoted portions of the charge (46a; brief p. 5) patently apply to contributory negligence and case law cited in defendant's request 24 (12a). Plaintiff did not except to any assumption of risk charge and withdrew his contrary request, which in any event would have been a discretionary charge, *Santos* v. *American Export Lines,* 339 F. 2d 206, 207 (2 Cir. 1964), when reassured that there was no assumption of risk defense (69a); *cf., Carabellese* v. *Naviera Aznar, S.A.,* 285 F. 2d 355, 358 (2 Cir. 1960), cert. denied 365 U.S. 872 (1961).

The charge near the bottom of 50a is a fair restatement of that approved in *Spano* v. *Koninklijke Rotterdamsche Lloyd,* 472 F. 2d 33, 35 (2 Cir. 1973). Again, no exception was taken.

> "[Appellant's] chief attack is upon the judge's charge, various portions of which he wrenches from context to give an appearance of error. Viewed as a whole we think the charge appropriate. * * * Moreover, plaintiff did not aid the judge at the time by pointing out objections now pressed * * *. His present criticisms are not of such kind as to justify overlooking the requirement of Fed. R. Civ. P. 51 of timely objection." *Nielsen* v. *Charles Kurz & Co.,* 295 F. 2d 692-693 (2 Cir. 1961), cert. denied 369 U.S. 876 (1962)

Plaintiff specifically withdrew (65a-66a) his objection to the negligent failure to warn *or correct* charge (45a), his same counsel having just lost that same argument in *Spano* v. *Koninklijke Rotterdamsche Lloyd, supra,* because:

> "In the light of the jury's finding, by special verdict, that there was no unseaworthiness, that is, there was nothing in the condition of the ship which could render the owner liable, it is clear that the jury never needed to reach the question of whether or not the owner failed in a duty to warn or correct." [footnoting that:] "Any difficulty on this point and others directed to the charge could have been avoided if counsel had not insisted on alleging both negligence and unseaworthiness. It is hard to imagine, especially on the facts of this case, how an owner could be negligent, if the ship was not unseaworthy", 472 F. 2d, p. 35.

Conclusion

The judgment appealed should be affirmed.

Respectfully submitted,

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APPENDIX

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At the time of plaintiff's 1970 accident, the Safety and Health Regulations for Longshoring were designated 29 C.F.R., Part 1504, §§ 1504.1-1504.106. Identical Regulations have since been redesignated 29 C.F.R., Part 1918, §§ 1918.1-1918.106 (36 F.R. 25232, Dec. 30, 1971).

§ 1504.2 Scope and responsibility.

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in § 1504.3(c).

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

§ 1504.3 Definitions.

(a) The term "shall" indicates provisions which are mandatory.

(c) The term "employer" means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments, as defined herein within the Federal maritime jurisdiction on the navigable waters of the United States.

(d) The term "employee" means any longshoreman, or other person engaged in longshoring operations or related employments, within the Federal maritime jurisdiction on

the navigable waters of the United States, other than the master, ship's officers, crew of the vessel, or any person engaged by the master to load or unload any vessel under 18 net tons.

§ 1504.91 Housekeeping.

(c) Slippery conditions shall be eliminated as they occur.

(d) Loose paper, dunnage and debris shall be collected as the work progresses and be kept clear of the immediate work area.

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